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93 2096 JUN 27 1994

NO. OFFICE OF THE CLERK

SUPREME COURT

OF THE UNITED STATE

JUNE TERM, 1994

Robert Bonser,

Petitioner

v.

Town of Nottingham, New Hampshire

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

NEW HAMPSHIRE

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Terry L. Bonser, Pro Se
24 Smoke St.
Nottingham, NH 03290
(603) 679-2036

Mary L. Parks Bonser, ProSe
(same)

69pp

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 93-557, Town of Nottingham v. Robert Bonser & a., the court upon December 13, 1993, made the following order:

Notice of appeal is declined. See Rule 7(1). Town's motion for summary affirmance is, therefore, moot.

Distribution:

Mark Gearreald, Esquire

Mr. Robert Bonser

Thomas Dunnington, Jr., Esquire

Rockingham County Superior Court E-438-81

Hon. Kenneth R. McHugh

Theresa Hayes, Supreme Court

File

Howard J. Zibel

Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 93-557, Town of Nottingham v. Robert Bonser & a., the court upon January 28, 1994, made the following order:

Defendants' motion for reconsideration is denied. Defendants' motion for declaratory judgment and invocation of part 1, article 10 cf the New Hampshire Constitution is also denied.

Distribution:

Mark Gearreald, Esquire

Mr. Robert Bonser

Thomas Dunnington, Jr., Esquire

Rockingham County Superior Court E-438-81

Hon. Kenneth R. McHugh

Theresa Hayes, Supreme Court

File

Howard J. Zibel

Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In case No. 90-424, Town of Nottingham v. Robert Bonser & a., the Court upon November 18, 1992 made the following order:

Upon a review of the briefs and oral argument, the court determines that the defendants did not have a right to a jury trial, as no such right exists in civil contempt proceedings. See Bonser v. Courtney, 124 N.H. 796, 810, 481 A. 2d 524, 532 (1984). Further, the Superior Court did not abuse its broad discretion in determining the conditions under which the town removed the mobile homes. See Town of Nottingham v. Bonser, 131 N.H. 120, 138, 552 A. 2d 58, 68 (1988).

While the Superior Court's order relative to the amount of the fine, under the conditions existing at the

time of its order, was reasonable, we conclude that the case should be remanded to the Superior Court for a decision as to whether or not the fine is now equitable in view of the character and magnitude of the harm threatened by the defendants' failure to remove the mobile homes and the defendants' financial resources and the consequent seriousness of the sanction's burden. See N.Y. State Nat. Organization for Women v. Terry, 886 F.2d 1339, 1352-53 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990).

Upon remand, the Superior Court should award the plaintiff town all costs and attorney's fees associated with this matter as a compensatory sanction, see United States v. United Mine Workers of America, 330 U.S. 258, 304 (1947), and should impose an appropriate fine, supported by findings, payable to the

Court, as a result of the coercive sanction, see General Signal Corp. v. Donallco, Inc., 787 F. 2d 1376, 1380 (9th. Cir, 1986), keeping in mind the considerations set forth above.

Reversed and remanded.

Distribution:

Clerk, Rockingham County Superior Court

Mark Gearreald, Esquire

Robert A. Bonser, pro se

Partners of Cedar Waters Village PS

Tenants of Cedar Waters

Thomas Dunnington, Jr.

Theresa H. Hayes, Supreme Court

Hon. Kenneth McHugh

File

Howard J. Zibel

Clerk

RULE 7. APPEAL FROM LOWER COURT DECISION ON THE MERITS

(1) The supreme court may, in its discretion, decline to accept an appeal, or any question raised therein, from a lower court after a decision on the merits, or may summarily dispose of such an appeal, or any question raised therein, as provided in rule 25. Unless otherwise provided by law, such an appeal shall be by notice of appeal in the form of notice of appeal approved by the supreme court and appearing in the appendix to these rules, filed by the moving party within 30 days from the date of the clerk's written notice of the decision on the merits.

NOTE: The definition of "decision on the merits" in rule 3 includes decisions on motions made after an order, verdict, opinion, decree or sentence. Timely filed

post-trial motions stay the running of the appeal period for all parties to the case in the lower court including those not filing such motions. Untimely filed post-trial motions will not stay the running of the appeal period unless the lower court waives the untimeliness within the appeal period.

In criminal appeals, the time for filing a notice of appeal shall be within 30 days from the date of sentencing or the date of the clerk's written notice of disposition of post-trial motions, whichever is later, provided, however, that the date of the clerk's written notice of disposition of post-trial motion shall not be used to calculate the time of filing a notice of appeal in criminal cases if the post-trial motion was filed more than 10 days after sentencing.

A-11

NO. 93-557

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1993 TERM
DECEMBER SESSION

ROCKINGHAM, SS.

TOWN OF NOTTINGHAM

V.

ROBERT A. BONSER, ET AL

MOTION FOR RECONSIDERATION

NOW COME the undersigned Appellants and respectfully request that this Court reconsider its Order, dated December 13, 1993 for all of the reasons stated in Appellants simultaneously filed Motion For Reconsideration in related case No. 93-556, Nottingham v. Bonser, et al., and Appellants Motion For

Declaratory Judgment And Invocation Of Article 10, Part First NH Constitution: Right Of Revolution, which are incorporated by reference as part of this Motion For Reconsideration, and as follows:

1. It is extremely important that this Court rule, as requested in Appellants NOA, as to whether this matter is now civil or criminal, prior to any disposition of this matter by this Court, as anything less would result in a serious deprivation of the Federal and State Due Process Rights of the Appellants.

2. If this matter has been converted to criminal, as every shred of case law, on the subject in this state would support, than Appellants are constitutionally entitled to a barrage of Constitutional Safeguards, both state & federal, none of which have been met by any court in this matter to date. See, page 8 of this NOA for cases and law relied on by Appellants, which are supported by Bonser v. Courtney, 124 NH 796 (1984),

"[c]ivil contempt proceedings may result in money fines payable to complainant". The moment the superior court awarded itself a specific amount of money in this matter the superior court became a plaintiff in the matter, converting the alleged contempt to criminal, and resulting in Chief Justice Nadeau becoming an actual party to this case in violation of Judge Nadeau's January 6, 1988 , Further Order On Motion To Recuse".

3. One of the more disturbing aspect of this Court's decision not to hear this appeal under its Rule 7 (1), is that this decision was made arbitrarily and without any consideration or review of the record or transcript of the lower court proceedings, by this Court, prior to its decision to decline to hear Appellants NOA.

4. The issues raised in Appellants NOA are unquestionably, undeniably meritorious and not only seriously effect Appellants, but have far reaching implications and adverse consequences for all criminal

and civil appellant/defendants, within the New Hampshire judicial process, and it is this Court's constitutional responsibility to clarify any vagueness within the laws of New Hampshire, which there certainly is regarding civil and criminal contempt, especially now in light of what this Court has recently ruled in this matter under its November 18, 1993 Order in No. 90-424, Nottingham v. Bonser & a., attached.

5. Should this Court fail in its constitutional responsibility to hear this matter, than these issues will be included with the issues from No. 93-556, supra, that this Court has been advised, in Appellants Motion For Reconsideration in No. 93-556, will be brought before the other two branches of government for the State of New Hampshire, as lawfully allowed under the New Hampshire Constitution.

FOR ALL THE FOREGOING reasons, including all those raised in Appellants' NOA filed on August 19, 1993, Appellants respectfully request this Court:

A. Accept this Notice of Appeal and set schedule for briefs and hearing on, at the very least, the civil v. contempt question presented herein; and/or

B Accept this Notice of Appeal and set schedule for briefs and hearing; and/or

C. Vacate the lower court rulings at issue herein; and/or

D. Place this matter in abeyance until such time as this matter is heard and resolved, in accordance with the New Hampshire Constitution, by the Executive branch and/or House and/or Senate of the State of New Hampshire; and/or

E. Place this matter in abeyance until such time as the meaning and effect of Article 10, Part One, New Hampshire Constitution, is established in this matter, as

requested by Appellants in simultaneously filed "Motion For Declaratory Judgment And Invocation Of Article 10, Part First NH Constitution: Rights of Revolution, either by this Court or the Executive branch and/or House and/or Senate of the State of New Hampshire.

Respectfully submitted,

CEDAR WATERS VILLAGE, INC:

December 22, 1993

By its counsel, per NH SupremeCourt
Thomas Dunnington, Jr.,Esq.

DEFENDANT, PRO SE:

Robert A. Bonser, Pro Se

INTERVENOR: CEDAR WATERS VILLAGE PARTNERSHIP, By all of it partners, pro se:

_____
Terry L. Bonser, Pro Se

_____
Mary L. Parks Bonser, Pro Se

_____
Robert A. Bonser, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion has been mailed, first class, postage prepaid to Mark Gearreald, Esq., at his address of record.

Date:_____ _____

copies to :

Gov.. Merrill

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. **SUPERIOR COURT**

THE TOWN OF NOTTINGHAM

V.

ROBERT A. BONSER et al

DOCKET NO. E-438-81

ORDER ON ISSUES REMANDED

BY SUPREME COURT

After extensive involvement in this litigation, this Court issued a 19-page final order dated July 20, 1990. The order referenced all of the pending issues in the case. An appeal was taken from that order to the New Hampshire Supreme Court. On November 18, 1992, the Supreme Court issued a one-page ruling which reflected the fact that it had reviewed the briefs of the parties and had conducted oral argument, but elected not to issue

a written opinion. The Supreme Court's directive of November 18, 1992 reaffirmed this Court's holding that the defendants did not have the right to a jury trial. The Supreme Court also affirmed the Court's decision regarding the removal of the mobile homes which were found to be in violation of the zoning ordinance. The Supreme Court, however, because conditions had perhaps changed since the time the homes were removed from the property, ordered the case be remanded to the Superior Court to determine whether or not the penalty which the Court affixed at something in excess of one million dollars should still be implemented. The Supreme Court in essence requested that this Court review all of the surrounding circumstances in this litigation to determine whether or not its initial penalty order should be reconsidered. The

Supreme Court also indicated that the Court should award the plaintiff all costs and attorney fees associated with this litigation as a matter of compensatory sanctions. It also indicated that the Court should impose an appropriate monetary penalty payable to the Court as a coercive sanction.

Upon receipt of the Supreme Court's order, this Court scheduled a hearing on May 7, 1993. The purpose of the hearing, as stated by this Court's preliminary orders, was to determine whether or not the amount of attorney fees and related expenses submitted by counsel for the plaintiff was reasonable; and, secondly, to determine what an appropriate penalty should be, which would be couched in terms of a fine payable to the Court. A hearing was in fact held on May 7, 1993, wherein these issues were discussed at

length. All defendants appeared and participated in the hearing. After the hearing, the Court gave both parties appropriate periods of time to submit additional pleadings and also gave the defendants an opportunity to submit to the Court financial affidavits reflecting their current financial situation, the information contained in these affidavits being for the Court's review only, not being disclosed to the plaintiff. Supplemental pleadings have, in fact, been filed which the Court has reviewed and, thus, the Court makes the within order on the pending issues.

The court will first discuss the issue of the attorney fees and removal costs claimed by the plaintiff. While the Supreme Court ordered this Court to award the plaintiff all costs and attorney fees associated with this case, this Court imposed the condition of

reasonableness on any fees and removal costs claimed by the plaintiff. It was this Court's belief that although the word "reasonable" was not contained in the Supreme Court's order, any fees or costs ordered would have to pass the reasonableness standard in order to be justified. The Court, therefore, ordered the plaintiff to submit a detailed accounting of all fees and costs claimed as a result of this litigation. This information was supplied to the defendants approximately one month prior to the May 7, 1993 hearing. The Court gave the defendants an opportunity to argue at the hearing that the work billed for was not appropriate and the defendants availed themselves of that opportunity. They also requested an opportunity to submit a further pleading attacking various charges made by the plaintiff and the Court has reviewed that pleading.

In reviewing the detailed accounting supplied by plaintiff's counsel, the Court is impressed by the thoroughness of the documents subrnitted. They break down the work billed for into various chronological periods and specifically indicate the nature of the work done as well as the time allotted for the work and the cost. The defendants do not take the position that the charges have not been sufficiently explained, however, they do raise several issues which they feel should compel the Court to rule that at least portions of the amount billed for should not be deemed compensable for various reasons.

The evidence submitted at the hearing revealed that the total of the plaintiff's claimed legal fees and related expenses up to and including the date of the hearing was $128,815.91. From that total, the plaintiff

concedes that the defendants are entitled to a credit of $6,750.00 for moneys previously paid. Thus, the claimed amount as of May 7, 1993, becomes $122,065.91. In addition, the plaintiff argues that it is entitled to reimbursement for all work done on the day of the hearing and later-filed related pleadings. While the Court agrees with that assertion, it notes that the plaintiff has failed to submit an affidavit for such work; and in an effort to bring this case to a close as soon as possible, the Court deems any claim for fees earned after May 7, 1993, waived.

A component of the moneys claimed by the Town consists not of attorney fees per se but, rather, expenses actually incurred by it in the removal and security of the illegal mobile homes. The total of these expenses is $41,004.44, and the defendants have been

provided with detailed invoices from the various service providers for this work done which include mobile home moving companies and security personnel necessary to carry out the removal action. While the defendants have a quarrel with a portion of these expenses, the Court finds that they are all reasonable. Inasmuch as the Town seeks nothing more than a dollar for dollar reimbursement for moneys expended in carrying out this Court's lawful order, the Court determines said sum is due and owing by the defendants to the Town.

At present, the Town claims it is owed a total of $122,065.91 for its costs and legal fees. The defendants have articulated nine specific objections to portions of the fees claimed. Those objections are set forth below:

1. No fees can be claimed for the period of time

when Robert Bonser was not in contempt of court, therefore, fees and expenses claimed prior to November 23, 1982 and after May 22, 1990 must be subtracted.

2. Part of the fees claimed by the Town was for litigation involved in the Federal Court. Inasmuch as this Court has no jurisdiction to assess fees for such work, and inasmuch as the Supreme Court did not have the total of these fees before it when it remanded the case back to this Court in its November 18, 1992 order, those fees must also be subtracted.

3. In a prior hearing several years ago before Judge Nadeau, the Town claimed fees of $23,067.38. He reduced that amount to $13,873.40, and, thus, the Town is not entitled now to resubmit

those previously excluded fees as part of its overall claim for fee reimbursement.

4. One portion of the plaintiff's fees is claimed to be $5,955.41. Adding the figures up reflects the fact that a transposition error was made by the Town, as the total for that particular work should have been $4,955.41.

5. In a prior appeal, the Supreme Court found the Town in error in granting the defendants and tenants the right to apply for building permits. The costs for this error are stated to be $1,076.66 by the Town, for which the defendants are not liable.

6. Any fees claimed after the last Supreme Court appeal should not be included, because when that Court issued its November 18, 1992 order

commanding the defendants to reimburse the Town for all legal fees it was aware of the general amount claimed by the Town at that time, however, the Supreme Court was not aware that the Town would be submitting additional fee charges in excess of $40,000.00. Had the Supreme Court realized the additional financial impact of such an increase, it might not have issued its all encompassing reimbursement order.

7. In addition to submitting fees for reimbursement in case number E-438-81, the plaintiff has also submitted fees for reimbursement in a different case currently pending in the Rockingham County Superior Court, a case wherein the plaintiffs allege fraudulent conveyance of property. The defendants argue that a strict

reading of the Supreme Court's remand to this Court was to limit the Town's right to seek reimbursement for attorney's fees to just this case, not to any other case between the parties, and, thus, any fees claimed for work done by the Town on the fraudulent conveyance should be subtracted.

8. The defendants also argue that some of the work billed for was unnecessary in the sense that allegations made by the plaintiff were not found to be meritorious either in this Court or on appeal to the Supreme Court. The defendants argue that they should not be billed for any work done by the Town on any issues which were either not found meritorious on the Superior Court level or were not found meritorious by the Supreme Court

on appeal.

9. The defendants argue that many of the fees claimed by the Town are either vague or excessive, and they question the entire billing procedure.

The Court will address each of the defendants' objections to the total fees claimed by the Town.

The defendants first claim that justice requires that fee reimbursement be limited to those times when defendant, Robert Bonser, was actually in contempt of court. In this Court's view, the Supreme Court was well aware of the fact that Robert Bonser was not in contempt for the entire period of this litigation when it issued its November 18, 1992 order, although, admittedly, it probably was not aware of the specific time periods involved.

The effect of the Supreme Court's November 18, 1992 order is to make the defendants fully liable for all out-of-pocket expenses and legal fees incurred by the Town as a result of its dealings with the defendants regarding the issue of the illegal mobile homes. However, it presumably recognized that the potential for the cost to the defendants for those items was high, and, thus, it remanded the case to this Court asking that it look at the other components of financial exposure that the defendants have; namely, the penalty component which the Supreme Court knew was approximately 1.5 million dollars. The Supreme Court was asking this Court to reconsider the penalty amount in the light of the fact that the defendants were being ordered to fully reimburse the Town for all of its fees and expenses.

The Supreme Court's remanded order must be read in its entirety, which, if done, makes its purpose clear. On the one hand, the Supreme Court is ordering the defendants to be fully responsible for the Town's monetary expenditures regarding all aspects of this case. Yet, on the other hand, the Supreme Court suggests that in view of the high cost of such expenditures, then perhaps the defendants' penalty should be reduced. As the Town suggests in its response to the defendants' reply on the attorneys fee issue, the Supreme Court has changed the rules of the game by expanding the Town's entitlement to all costs and attorneys fees, not just those previously referenced or approved. That being this Court's interpretation of the Supreme Court's directive, it finds that the defendants are responsible for all of the Town's

expenditures for legal fees, even for those periods of time when defendant, Robert Bonser, was not technically in contempt of any court order. The "consideration" for this more expansive order regarding the reimbursement of cost and fees is the reduction of the penalty portion of this Court's July 20, 1990 order, which this Court will address later on herein.

The defendants also claim that they cannot be held responsible for any legal expenses incurred by the Town in any litigation involving them in the Federal Court. Contrary to the defendants' assertions, this Court does have the authority to order reimbursement for expenditure of funds from other courts so long as the expenditures are legitimately involved in this dispute between the parties concerning the illegally placed mobile homes. The Court finds that the expenditures

listed by the Town for work done in Federal Court were specifically involving the mobile homes at issue, and, therefore, the Town legitimately can claim reimbursement from the defendants for work done in Federal Court in the context of this litigation. Moreover, the Court also finds that the Supreme Court's directive for full reimbursement to the Town would include work done in other forums, such as the Federal Court, so long as the work billed was involving the illegally placed mobile homes.

The defendants argue that inasmuch as Judge Nadeau struck a portion of the Town's legal expenses many years ago as part of one of his orders, then his decision to eliminate certain expenditures is binding on this Court. The Town, they argue, cannot now resubmit those previously eliminated expenditures as part of their

overall claim against the defendants for reimbursement of attorney fees. Although the defendants abhor the past participation of Judge Nadeau in this litigation, apparently they did like a portion of one of his orders. Nevertheless, the Court finds that in light of the Supreme Court's apparent decision to give the defendants a break in terms of the reduction of a penalty for contempt of court, it was the Supreme Court's intention to make the Town whole with respect to legal fees expended, and, thus, the Court finds that the Town has the right to now add in attorney fees that had been previously excluded by Judge Nadeau. Note that when Judge Nadeau excluded some fees years ago he did not do so on the basis that the fees charged were excessive, Rather, he simply felt that in light of the amount of those fees he would order a reduction in

the hopes of getting the defendants to pay the reduced amount without further objection. Obviously, any hope that Judge Nadeau may have had in that regard was never realized.

The defendants make reference to what appears to be a transposition error in one portion of the plaintiff's claim for attorney fees. In reviewing that portion of the Town's bill, both the plaintiff and the Court agree with the defendants that an error was made, and, thus, the total of the legal fees claims by the plaintiff should be reduced by $1,000.00.

The defendants also argue that they were billed for work surrounding the application for building permits. They allege that the error reflected in a charge of $1,076.66. As the plaintiff has correctly explained in its response to defendants' reply to attorney fees, the

amount at issue herein is valid but not previously billed, consequently it should be the responsibility of the defendants.

The defendants also object to being responsible for fee amounts in excess of $40,000.00 that were generated after the Supreme Court last had an opportunity to review this case. They argue that if the Supreme Court knew that the attorney fees claimed by the plaintiff would be some $40,000.00 higher than what they were aware of when they issued their November 18, 1992 order, then in fact some limit may have been placed on the reimbursement of attorney fees. The Court disagrees. As the Court has set forth herein, it believes that the Supreme Court intended that the Town be fully reimbursed for all legitimate expenses no matter what the amount was so long as this Court reviewed

with an eye toward reducing the penalty sanction, which the Supreme Court had been notified approximated 1.5 million dollars.

The defendant points out that the plaintiff has submitted bills for work done in the collateral case of fraudulent conveyance, which is a different case than the one for which the Supreme Court order was applicable. Again, however, in this Court's view, the fraudulent conveyance case was a natural outgrowth of this litigation. In fact, the plaintiff was required to bring the fraudulent conveyance equity action as a result of the defendants' actions in this litigation. There were allegations made of a transfer in the legal title to the property, and the sole purpose for the plaintiff bringing the fraudulent conveyance action was to enable it to obtain a real estate attachment on the defendants'

property so that that property would be available to satisfy any monetary reimbursement that the Town was hoping to recoup at the time the fraudulent conveyance action was filed. While it is true that no formal finding of fraudulent conveyance was made in that other case, it is also true that the merits of that other case were never litigated because the purpose for which it was brought, namely, the obtaining of a real estate attachment, was realized, and, thus, there was no further need for the plaintiff to go forward in that other case. In this Court's view, the sole reason for filing the fraudulent conveyance case was the actions of the defendants in terms of changing the legal titleholder to the property at issue. It is, therefore, logical to order that the defendants reimburse the Town for all expenses related to the bringing of the fraudulent conveyance

case.

The defendants also feel that any work that was billed for to support any allegations made by the Town that were not found to be meritorious by either this Court or the Supreme Court on appeal should not have to be their responsibility. The Court would agree with the defendants that if upon review of the plaintiff's legal fee statements there was evidence that the Town insisted upon arguing issues that were clearly nonmeritorious for the sole purpose of increasing the size of their legal fees, then those charges should not be reimbursable by the defendants. However, the Court does not see any evidence of those kinds of charges in the legal fee statements. The mere fact that all of the plaintiff's legal arguments may not have been found to be meritorious does not negate the Town's right to

obtain reimbursement of legal fees. Inasmuch as the Court has specifically found that none of the plaintiff's legal arguments can be found to be frivolous, the Court finds that all of the legal fees claimed by the plaintiff, less those herein specifically subtracted, are reasonable and should be the responsibility of the defendants.

The defendants' final objection to the payment of attorney fees is that they claim some of the charges are either vague or excessive. The Court, however, is not impressed with the defendants' seemingly haphazard attempt to pick and choose individual charges and allegations that they claim did not appear to be related to this litigation. While it would be impossible for this Court to make a factual finding about the validity of each and every charge billed for, given the fact that this case encompasses over 450 pleadings and involves

litigation extending for 12 years, the Court has reviewed all of the charges and finds that they all appear to be reasonable and directly related to this litigation. Moreover, the Town in its reply has addressed the specific charges questioned by the defendants and explained why they were all valid; and the Court finds its explanation to be credible.

In summary, on the issue of reimbursement for costs and attorney fees, the Court finds and rules that the Town of Nottingham is entitled to be paid the total sum of $121,065.91 by the defendants.

The Court will now revisit the penalty issue. The file reveals that the first time a civil monetary penalty was assessed against the defendants for their failure to remove the offending homes from their property was back in 1982 when the Court ordered a daily penalty of

$50.00 be paid until the homes were removed. No attempt was made to remove the homes under the order, and there was an accumulated penalty of $38,550.00 as of May 23, 1985. On that date, the Court suspended the implementation of the $50.00 penalty and the issue was not addressed until one year later. The order indicated that the penalty would be forgiven if the defendants took certain action, which they failed to take; thus that penalty amount remains owed at this time.

In addition, as a result of an order dated May 21, 1986, a $1,000.00 daily penalty was assessed commencing on May 28, 1986, and terminating when the homes were removed. The Court (Nadeau, J.) hoped the drastic increase in the amount of the daily penalty would force compliance with the Court's

previous orders, but it did not. The order remained in place from May 28, 1986 until May 22, 1990, the day the homes were removed from the property. The $1,000.00 penalty remained in effect for 1,453 days; meaning that the amount of the penalty for that four-year period is $1,453,000.00.

In its final order of July 20, 1990, this Court concluded that due to the particularly egregious nature of the contempt and the failure to voluntarily remove the homes at any time by the defendants, the penalty of $1,000.00 a day was justified. The Supreme Court in its remand order has asked the Court to reconsider the penalty in light of the circumstances as they now exist, which the Court will do herein.

The defendants argue that they have been punished enough. They had to stand by and watch the

homes be forcibly removed from their property. They conclude that by having the homes removed and by getting their attorney fees and costs reimbursed, the Town has been made whole and, therefore, no further penalty should be addressed. The Court disagrees. Were the Court to adopt the defendants' thinking on this issue, then it would be condoning the willful violation of its long-standing orders with respect to the removal of those homes. It would demean the integrity of the Court, and would constitute an open invitation to any person to ignore court orders and fear no reprisal other than an assessment of the prevailing parties' legal fees. Clearly, that cannot be allowed.

While this Court can justify its increasing the daily penalty from $50.00 to $1,000.00 at the time of its May 26, 1986 order, it finds that when said order was made,

the Court could not have anticipated that the penalty would rise to nearly 1.5 million dollars before the homes were removed.

Presumably because the Supreme Court did not know the financial condition of the defendants, it remanded the issue of what an equitable penalty should be in light of the defendants' current assets and liabilities. The plaintiff has submitted a report of the defendants' assets as they appear in the public records. Those records reflect that the defendants have assets of over one million dollars. The defendants have submitted a report of their financial position to the Court in camera, and while the Court will not breach the confidence of the defendants by sharing the specifics of that information with the plaintiff, suffice it to say they agree they have assets in excess of one million dollars.

In view of the fact that the defendants do have substantial assets, it can be argued that a penalty of 1.5 million dollars, while constituting an amount in excess of the defendants' assets, is not extraordinarily high. Still, the punishment should fit the crime, and considering the defendants' finances, a penalty of 1.5 million dollars is not warranted or reasonable. Admittedly, when this Court affirmed the penalty of 1.5 million dollars in its July 20, 1990 order, it did so without any knowledge of the defendants' assets. Upon reflection, the Court hereby reduces the daily penalty for noncompliance from $1,000.00 to $100 for the four years in question. Thus, the Court reduces the penalty portion of the defendants' financial obligation from $1,453,000.00 to $145,300.00 for the time period May 28, 1986 through May 22, 1990. When the earlier penalty amount of

$38,500,00 is added, the defendants' total financial penalty payable to the Court becomes $183,850.00.

At the hearing, the defendants reminded this Court that the last detailed Supreme Court opinion that was rendered in their case, to wit, The Town of Nottingham v. Robert A. Bonser, et al, 131 N.H. 120 (December, 1988), stated that it was not the proper business of municipalities to profit from violations of their land use regulations, nor was it the proper business of the judiciary to allow them to do so. They suggest, therefore, that the Town should have set in motion all that had to be done for a forced removal of those homes at an earlier date. Had the Town done so, then the amount of days wherein the penalty was assessed would have been greatly reduced.

The court cannot penalize the Town for waiting

until May of 1990 to take the drastic action that it did. The defendants continually appealed court orders which made the Town reluctant to act while any facet of this litigation was on appeal. Moreover, the Town recognized that if it had to forcibly remove the homes, then tenants would have to be evicted and that type of radical solution should only be looked to as a last resort.

The Town also correctly points out that it was not until the Supreme Court opinion in December of 1988 that informed it that a radical removal of the homes was appropriate and authorized under the circumstances. The Town then set in motion procedures to get the necessary authorizations to forcibly remove the homes; however, that was not accomplished until May of 1990 because of the various tactics used by the defendants to delay such a removal order. Thus the defendants

find themselves in the untenable position of having to argue that on the one hand the Town should have forcibly removed the homes at an earlier date while having to face the stark reality that the long delay was as a direct result of their resistance and legal maneuvering. For these reasons, the Court cannot find that the penalty period was excessive.

Even if it can be argued that the penalty sanction should not be tied into the period of time between Judge Nadeau's 1986 order and the removal of the houses in 1990, the plain fact is that a punitive fine of less than $200,000 in a case lasting 12 years with numerous incidents of contemptuous behavior on the part of the defendants cannot be said to be unreasonable or unjust, particularly when the defendants have assets in excess of one million dollars.

A review of the financial information supplied to the Court indicates that the defendants have the financial ability to pay all that has been assessed against them in terms of both attorneys fees and related expenses due the Town of Nottingham and in terms of the penalty sanction due the Court. Admittedly, the defendants will probably have to sell a portion of their real estate or mortgage it in order to get the funds necessary to pay the amounts ordered. Nonetheless, that burden is not unreasonable to impose in light of the fact that it was the defendants' own knowing and long-standing actions that have caused them to incur the financial obligations imposed upon them this date.

To the extent that the defendants are desirous of appealing the within order to the Supreme Court, the financial obligations imposed will be stayed pending the

Supreme Court's consideration of the appeal, assuming the appeal is properly perfected and assuming the case is taken by that Court. However, as in the case of any final judgment, interest on both the amount due the Town and the Court shall begin to accrue this day at the statutory rate until the matter is terminated and the amounts paid, unless, of course, the within order is reversed on appeal.

So ordered.

DATED: June 14, 1993

[Kenneth R. McHugh]

Kenneth R. McHugh

Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

1992 TERM

NOVEMBER SESSION

NO. 90-424

TOWN OF NOTTINGHAM

V.

ROBERT A. BONSER AND

CEDAR WATERS VILLAGE, INC.

TOWN'S MOTION FOR PARTIAL RECONSIDERATION

NOW COMES Plaintiff Town of Nottingham in the above entitled matter and says:

1. That this Motion requests reconsideration of this Court's Order of November 18, 1992 in two respects: first, with respect to the remand of the case

to the Superior Court for a decision as to whether or not the fine is now "equitable", and second, with respect to that aspect of the Court's Order making a portion of the civil contempt fines payable to the court as opposed to Plaintiff Town.

2. That the remand for the Superior Court to consider the factors set forth in the second paragraph of this Court's Order of November 18, 1992 makes no sense at this juncture. In the case of NY State Nat. Organization for Women v. Terry, 886 F.2d 1339, 1352-1353 (2nd Cir. 1989) cited by the Court, the Second Circuit Court of Appeals was indicating what factors a Court should consider "when imposing coercive sanctions". Id. at 1353. In this case, the $1,000.00 per day fine was imposed by Judge Nadeau's Order of May 21, 1986, which was upheld by this Court in Town of

Nottingham v. Bonser, 131 N.H. 120 (1988). Judge McHugh examined the reasonableness of the fines and penalties in his final Order of July 20, 1992 and found that $1,000.00 per day was reasonable. In doing so, Judge McHugh examined in detail various factors including the number of homes in violation of the Zoning Ordinance, the lack of any attempt on the part of Defendants to request a stay in the assessment of fines to enable them to remove the homes, the Defendants' complete defiance of the assessment which never changed until the homes were forcibly removed in May of 1990, and Defendants' knowledge from May of 1986 that every day they failed to comply with Court Orders decreased their monetary interest in the property. (See final Order dated July 20, 1990 at 16-18, reproduced in Defendants' Notice of Appeal at 30-32). Nothing has

changed with respect to the status of this matter either in terms of the conditions that forced the Town itself to remove the mobile homes or in terms of the Defendants' unabated defiance. What this Court's remand does is to give Defendants yet another bite at the apple in their quest to avoid the consequences of the contempt brought on by their own contumacious conduct. Where this Court itself has complained the "The amount of judicial time expended thus far without eliminating a scintilla of the underlying violation is now beyond calculation," Town of Nottingham v. Bonser, supra, 131 N.H. at 137, it is hard to envision why this Court would now want to open yet another chapter in this matter to permit yet further proceedings on the amount of fines that have twice been previously addressed at the Superior Court level and by this Court. Nothing in the

history of this case warrants any such re-examination, nor is same deserved by these Defendants. Indeed, even allowing for the possibility of an escape from the consequences of contempt in this long-standing case of notoriety would appear to reward the very conduct in which Defendants have engaged.

3. That the authority cited in that portion of this Court's Order of November 18, 1992 indicating that accumulated fines above "all costs and attorney's fees" should be payable to the Court, is case law from the Federal Courts. However, the case law is contrary to New Hampshire common law as enunciated by this Court, upon which the Superior Court relied in awarding all civil contempt fines here to the Town. This Court long ago in Town of Nottingham v. Cedar Waters, Inc., 118 N.H. 282, 285 (1978) held that "in civil contempt,

the punishment is remedial, coercive, and for the benefit of the complainant. Civil contempt proceedings may result in fines payable to the complainant." In this regard, in the course of distinguishing between civil and criminal contempt, this Court has cited as authoritative Douglas, Civil and Crinimal Contempt in New Hampshire, 17 N.H.B.J. 13 (1975) Town of Epping. v. Harvey , 129 N.H. 688, 691 (1987). In that article, former Associate Justice Douglas of this Court noted that " Fines levied in civil contempt are compensatory and go to the moving party. Criminal contempt fines go to the government as with any other fine." 17 N.H.B.J. at 25. This Court in this case has long ago determined that the contempt here is civil as opposed to criminal. Bonser v. Courtney, 124 N.H. 796, 808 (1984). The import of this Court's November 18, 1992 ruling that

accumulated fines in excess of costs and attorney's fees are now to be "payable to the court" is to convert this case to criminal as opposed to civil contempt. If the Court is now holding that it is still civil contempt to have fines over and above costs and attorney's fees go to the court rather than to the complaining party, then a change in long-standing New Hampshire law is being worked in the context of an unpublished decision.

4. That none of the aspects of this Court's Order of November 18, 1992 for which partial reconsideration is here sought by the Town were briefed or argued by the parties in the context of this Appeal but rather were ordered by this Court on its own motion.

WHEREFORE, Town of Nottingham requests that this Honorable Court:

A. Reconsider its own Order of November 18,

1992 to the end of (1) rescinding the Order for remand to the Superior Court, and (2) ordering that all accumulated fines as imposed by the Superior Court are affirmed and should remain payable to Plaintiff Town of Nottingham; and

B. Grant such other and further relief as may be just.

Respectfully submitted.

TOWN OF NOTTINGHAM

By its Attorneys,

ENGEL & GEARREALD,, P.A.

Dated: November 30, 1992 By: _____

Mark S. Gearreald, Esq.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been mailed this day by first cass mail, postage prepaid, to

Thomas C. Dunnington, Jr., Esq., Robert A. Bonser, Terry L. Bonser, Mary L. Bonser, Mary T. Bonser, John Bunza, Kimberly Jo Bundza, Virginia L. Gray, Madith Hersey. Nancy Hetnar and David Hetnar.

Dated: November 30, 1992

[Mark S. Gearreald]

Mark S. Gearreald

A-62

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

ROCKINGHAM, SS **FEBRUARY TERM, 1993**

E-438-81

Town of Nottingham

v.

Robert A. Bonser, et al

MOTION TO RECONSIDER
ORDER DATED JANUARY 21, 1993

NOW COME the Defendants and intervenors (Defendants) and respectfully move that the January 21, 1993 order be reconsidered, as failing to be in harmony with the Supreme Court Order of November 18, 1992 (1992 Order), as follows:

1. By virtue of the 1992 Order, which issued as a result of Defendants' appeal, the Supreme Court "Reversed and remanded" this court's orders that were appealed

(subject to the conditions of the 1992 Order), including those orders of this court that determined the amount of costs and attorney's fees. Therefore, an amount has yet to be determined.

2. By this court's order of January 21, 1993 Plaintiff was granted the right of discovery, however it failed to grant to Defendants' the equal right of discovery as to what Plaintiff claims are the amounts of costs and attorneys fees owed and Defendants are asserting that they have the right to perform discovery as to all the claims of attorney's fees and costs alleged by Plaintiff and for this court to grant discovery to Plaintiff and not to Defendants gives the appearance of partiality on the part of this court.

3. Also, Defendants have <u>never</u> had a full evidentiary hearing before a fair and impartial court, as to the actual amounts of "costs and attorney's fees (or fines associated with this matter" and Defendants are

asserting their claim, which is supported by the 1992 Order, to such a trial, herein.

4. By virtue of the 1992 Order the Supreme Court ruled that any fines imposed would be "payable to the court". This court erred in granting discovery, in regard to this matter, to Plaintiff. Plaintiff can not represent "the court['s]" interest, as that would be unethical, prejudice Defendants' case and would give the appearance of partiality on the part of this court and nothing in the 1992 Order of the Supreme Court can be construed as granting Plaintiff the ability to represent "the court". Further, Defendants should not have to pay Plaintiff's costs or attorney's fees for doing discovery or prosecuting on behalf of the court. See, Town's Motion For Partial Reconsideration, attached, specifically paragraph 3, which, in essence, agrees with Defendants' position on this matter.

5. In summary: Plaintiff has claimed a specific amount of costs and attorney's fees, no further discovery is required on the part of Plaintiff. Defendants need and have the right of discovery to ascertain whether or not the costs and attorney's fees alleged by Plaintiff are accurate prior to a full evidentiary hearing, on the matter of costs an attorney's fees, before a fair and impartial court. The court's interest in this matter - the imposition of appropriate fines, supported by findings, payable to the court, cannot be represented by Plaintiff in any manner, whatsoever. See, Rules of the Supreme Court of the State of New Hampshire, Rule 38, Code of Judicial Conduct, Canon 1 - 7; New Hampshire Constitution, including, but not only, Part 1, Article 2d, 4th, 5th, 6th, 8th, 10th, 14th, 15th, 18th, 20th, 22d, 33rd, 35th, 38th, Part 2nd, Article 73, 73-a; United States Constitution, including but not only, Bill of Rights,

4, 5, 6, 7, 8, 14, which are incorporated by reference as part of this motion.

6. Defendants take exception to this court's remarks, at the end of its January 21, 1993 order, as the remarks indicate a preconceived opinion (bias) on the part of this court towards Defendants.

7. By the filing of this motion Defendants are not granting jurisdiction to this court, but are merely raising and preserving the issues.

WHEREFORE, Defendants respectfully request that this court reconsider its January 21, 1993 order, so as to be in harmony with the 1992 Order of the New Hampshire Supreme Court.

Respectfully submitted,

February 3, 1993 [Robert A. Bonser]

Robert A. Bonser, Pro Se

CEDAR WATERS VILLAGE, INC.

[Thomas Dunnington, Jr.Esq.]

By its counsel, per order

NH Supreme Court

Thomas Dunnington, Jr., Esq.

INTERVENORS:

CEDAR WATERS VILLAGE

PARTNERSHIP, PRO SE,

BY ALL OF ITS PARTNERS,

PRO SE

[Terry L. Bonser]

Terry L. Bonser, Pro Se

[Mary L. Bonser]

Mary L. Bonser, Pro Se

[Robert A. Bonser]

Robert A. Bonser, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I have mailed today, first class, postage prepaid, a true copy of the foregoing to Mark Gearreald, Esq., at his address of record.

February 4, 1993 [Mary L. Bonser]